Supreme Court, U.S.
FILED

184

101156 MAR 18 2011

Case No. 10-275

OFFICE OF THE CLERK

In The

Supreme Court of the United States

TROY BURDINE,
Petitioner,

v.

ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION; RICHARD WEISS, DIRECTOR,
Respondent.

On Petition for Writ of Certiorari
To The Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

Hershell Koger
Counsel of Record for Petitioner
128 Sunset Dr., P.O. Box 1148
Pulaski, TN 38478
(931) 309-1534
kogerlaw@hotmail.com

QUESTIONS PRESENTED

1. Regarding the Federal Motor Carrier Safety Regulations, when an alleged disqualifying offense occurs in one State, and the licensure/disciplinary action occurs in another State, which of the two States' substantive law applies in determining whether the alleged offense occurred?

2. Does an administrative determination that a person was arrested based upon probable cause that the person was driving while intoxicated, equate to a "conviction" as defined in the Federal Motor Carrier Safety Regulations?

Corporate Disclosure

The corporate disclosure required by Rule 29.6 does not apply in this case.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure	ii
Table of Contents	iii
Table of Authorities	v
Opinion Below	1
Jurisdiction	1
Constitutional Provisions, Statutes And Regulations at Issue	1
Statement of Facts	3
Reasons for Granting Petition:	
The FMCSR does not provide which State's law substantively determines whether a "conviction" has occurred.	7
An administrative finding that Petitioner was arrested for DWI is not a "conviction" under the FMCSR.	12
Conclusion	13

Page

Appendix:

Burdine v. Arkansas Department of Finance & Administration; Richard Weiss, Director, 2010 Ark. 455, (Ark. Sup. Ct. 2010). APP 1

Missouri Revised Statutes, Chapter 302 - Drivers' and Commercial Drivers' Licenses Section 302.505 APP 19

Arkansas Code Annotated §27-23-103. Definition of "conviction" APP 21

Arkansas Code Annotated §27-23-112. Disqualification and cancellation APP 22

Excerpt of Abstract of De Novo Hearing APP 24

TABLE OF AUTHORITIES

	Page
Cases:	
Caminette v. United States, 242 U.S. 470 (1917).	13
Michigan v. Long, 463 U. S. 1032 (1983).	11
Minnesota v. National Tea Co., 309 U.S. 551 (1940).	7
United States v. *James*, 478 U. S. 597 (1986).	12
Statutes:	
49 CFR § 383.51(b)(1)	12
49 CFR § 384.206(b)(2)	8
49 CFR § 384.231	12

[THIS PAGE INTENTIONALLY LEFT BLANK]

OPINION BELOW

The opinion below is from the Supreme Court of Arkansas, styled *Troy Burdine v. Arkansas Department of Finance & Administration; Richard Weiss, Director*, 2010 Ark. 455, (Ark. Sup. Ct. 2010). A copy of the opinion is included in the Appendix at APP 1-18.

JURISDICTION

The Arkansas Supreme Court entered its judgment on November 18, 2010, and this Petition seeks review of the Arkansas opinion. On February 10, 2011 Justice Alito extended the time to file the instant Petition to March 18, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

Federal Motor Carrier Safety Regulations:

49 CFR §§ 383.51 Disqualification of drivers.

(a) General.

(1) A driver or holder of a CDL[1] who is disqualified must not drive a CMV[2].

. . . .

(3) A driver is subject to disqualification sanctions . . . if the holder of a CDL drives a CMV or non-CMV and is convicted of the violations [listed].

---

[1] Commercial Driver License.

[2] Commercial Motor Vehicle.

. . . .

(b) Disqualification for major offenses. [A] driver must be disqualified, depending upon the type of vehicle the driver is operating at the time of the violation, as follows:

. . . .

If a driver operates a motor vehicle and is convicted of:

(1) Being under the influence of alcohol as prescribed by State law . . . a CDL holder must be disqualified from operating a CMV for 1 year.

*****

49 CFR § 383.5 Definitions.

. . . .

Conviction means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

*****

49 CFR § 384.206 State record checks.

(a) Required checks—

. . . .

(2) Other States' records. Before the initial or

> transfer issuance of a CDL to a person, and before renewing a CDL held by any person, the issuing State must:
>
> > (i) Require the applicant to provide the names of all States where the applicant has previously been licensed to operate any type of motor vehicle.
>
> . . . .
>
> (b) Required action. Based on the findings of the State record checks prescribed in this section, the State of record must do one of the following as appropriate:
>
> . . . .
>
> > (2) In the event a State obtains adverse information regarding the applicant, promptly implement the disqualifications, licensing limitations, denials, or penalties that are called for in any applicable sections of this subpart. . . .

*****

STATEMENT OF FACTS

At all times relevant, the Petitioner, Troy Burdine, had a commercial driver's license, ("CDL"). Petitioner, (at the time an Oklahoma resident), was arrested in McDonald County, Missouri on July 1, 2007, and charged with Driving While Intoxicated, ("DWI"). That criminal charge was dismissed (by *nolle prosequi*) on October 15, 2007.

After the DWI criminal charge was dismissed, the Missouri Department of Revenue ("MDR") conducted an administrative hearing on October 23, 2007. The finding from the hearing was that Petitioner had been *arrested*

upon probable cause to believe that he was driving a motor vehicle while his alcohol concentration was at or above the limit required by 302.505, Revised Statutes of Missouri ("RSMo"). Based upon this finding, Missouri suspended Appellant's driver's license for 3 months, from November 14, 2007 to February 12, 2008.

In January 2009, Appellant moved to Arkansas and accordingly requested that his CDL be transferred from Oklahoma to Arkansas. Through that transfer process, the Arkansas Department of Finance and Administration ("DFA") reviewed Petitioner's driving record and concluded that his CDL should have been suspended for 1 year based upon the earlier DWI arrest in Missouri, and that Arkansas was therefore going to suspend Appellant's CDL for 1 year. DFA determined that the Federal Motor Carrier Safety Regulations ("FMCSR") mandated Arkansas to take the suspension action.

Appellant contested the suspension to the Office of Driver Services, Revenue Division, DFA. The Office of Drive Control effectively determined it did not know what to do regarding the matter, and referred in to their legal department. On April 21, 2009, DFA conducted a hearing on the matter and interpreted Arkansas Code Annotated §§27-23-112 and 27-23-103(9), and Missouri Revised Statute §302.505, to conclude that and the Federal Motor Carrier Safety Regulations ("FMCSR") §§ 384.206 and 384.231 to require a 1-year suspension of Petitioner's CDL.

The DFA's decision was appealed *de novo* to the Circuit Court of Benton County, Arkansas. That was an evidentiary hearing. At that hearing a DFA representative testified that a licensee did not have to be convicted in a criminal court to impose the CDL

disqualifications; that Arkansas' definition of "conviction," included a finding by an administrative tribunal; and that the Arkansas DFA concluded Petitioner's DWI arrest and administrative action in Missouri was a "conviction" for the purpose of the FMCSR. At the conclusion of the hearing the Circuit Court upheld DFA's decision. That ruling was timely appealed to the Arkansas Supreme Court.

The Arkansas Supreme Court determined that the administrative finding by the MDR was a conviction for purposes of the federal regulations; that the records obtained by the DFA showed that no disqualification (1-year suspension of Appellant's CDL) had been previously implemented based on Appellant's Missouri DWI arrest; that a disqualification was required under the federal regulations as adopted by the State of Arkansas; and, therefore Appellant's CDL should be suspended for 1 year.

Rule 14(1)(g)(i) Jurisdictional Compliance References

Pursuant to 14(1)(g)(i) of this Court, in the court of first instance the federal questions presented here were raised and ruled upon as follows: In the Circuit Court of Benton County, Arkansas, the Petitioner filed a Petition for De Novo Review of the Arkansas DFA ruling disqualifying Petitioner under the FMCSR. Paragraph 6 of that Petition alleged that the administrative disqualification was based upon the DFA's "erroneous interpretation of State and Federal law, as well as the United States Constitution." During the de novo hearing, the issues regarding the determination of which States' substantive law applied in the case, and the determination of a "conviction" were presented. *See* Excerpt of Abstract from *De Novo* Hearing, APP 24-25.

The Benton County Circuit Court then entered an Order affirming the DFA's ruling.

Pursuant to Rule 14(1)(g)(i) of this Court, in the lower appellate court the federal questions presented here were raised and ruled upon as follows: Petitioner timely appealed the Benton County Circuit Court judgment to the Arkansas Supreme Court. In that court Petitioner's "Jurisdictional Statement" in his primary appellate brief stated the following:

> The issue on appeal is whether the circuit court and the DFA incorrectly interpreted Missouri, Arkansas, and federal laws when they held that an administrative suspension for an arrest constituted a conviction of driving while intoxicated for the purpose of disqualifying [Petitioner's] commercial driver's license even though the criminal charges were dismissed.

The Arkansas Supreme Court's opinion states the following regarding the issues considered on appeal:

> In this appeal, Burdine challenges the circuit court's order affirming the disqualification of his CDL by DFA's Office of Driver Services. Specifically, Burdine argues that the suspension of his driver's license in Missouri was not a conviction for driving while intoxicated warranting disqualification. He contends that the MDR's administrative finding of DUI was not a conviction under Arkansas law, and, he asserts, the Federal Motor Carrier Safety Regulations require a one-year suspension only when a person is convicted of driving under the influence of alcohol as defined by state law. APP 6-7.

The Arkansas Supreme Court's Opinion further states the following regarding its ruling in the case:

> Here, the finding by the MDR, an administrative tribunal, was that Burdine had violated or failed to comply with Missouri law; thus, the finding was a conviction for purposes of the federal regulations. According to the records obtained by DFA, no disqualification had been previously implemented for Burdine's DUI conviction by the MDR, as required by the foregoing regulations. For that reason, DFA disqualified Burdine's CDL for one year, as required by the federal regulations recognized and adopted by this state and set forth above. APP 10-11, (footnote omitted).

Accordingly, the federal questions were timely and properly raised in the lower courts, and this Court has jurisdiction to review the judgment on a writ of certiorari.

REASONS FOR GRANTING PETITION

The FMCSR does not provide which State's law substantively determines whether a "conviction" has occurred:

The Arkansas Supreme Court has decided important questions of federal law that have not been, but should be, settled by this Court. In the situation where a CDL holder transfers his CDL from one State to another, the FMCSR is silent as to which State's substantive law controls in determining whether a violation of the FMCSR has occurred. This Court has long recognized that "there is an important need for uniformity in federal law." *Minnesota v. National Tea Co.*, 309 U.S. 551, 556 (1940).

Review by this Court will insure uniformity in the several States' application of the FMCSR.

In this case, Petitioner sought to transfer his CDL from Oklahoma to Arkansas. During the transfer process, Arkansas conducted a records check per 49 CFR § 384.206. Through that check Arkansas became aware of the 3-month license suspension imposed upon Petitioner by a Missouri administrative agency. Arkansas ultimately determined the 3-month suspension was a "conviction" as that term is defined by the FMCSR, at 49 CFR § 383.5.

The FMCSR directs that a State receiving a CDL transfer from another State perform a record check, and if it is determined that a disqualifying event occurred, and that the appropriate disqualification action had not been implemented, that the receiving State is to implement the appropriate disqualification action itself. 49 CFR § 384.206(b)(2). However, the FMCSR provides no guidance as to whether the receiving State's substantive law, or the substantive law of the State where the alleged disqualifying event occurred should be used to determine whether the disqualifying event actually occurred. That notwithstanding, the Arkansas Supreme Court determined that combining select sections of Missouri's substantive law, and interpreting Arkansas' application of the FMCSR's disqualification rules, was the correct methodology, stating:

> Here, the finding by the MDR, an administrative tribunal, was that Burdine had violated or failed to comply with Missouri law; thus, the finding was a conviction for purposes of the federal regulations. According to the records obtained by DFA, no disqualification had been previously implemented

> for Burdine's DUI conviction by the MDR, as required by the foregoing regulations. For that reason, DFA disqualified Burdine's CDL for one year, as required by the federal regulations recognized and adopted by this state and set forth above. APP 10-11, (footnote omitted).

Uncertainty regarding which State's substantive law applies results in unpredictable and arbitrary application of the FMCSR's disqualification rules. The dissent in Petitioner's case illustrates the unpredictable and arbitrary application possibilities of the FMCSR, stating the following in relevant part:

> The conduct of being stopped on probable cause for driving under the influence and a later suspension based on that conduct, standing alone, constitutes a disqualifying event under Missouri law . . . and is defined in Missouri's Commercial Driver's License Act as "driving under the influence of alcohol." . . . . This is not the law in Arkansas. Arkansas's CDL law defines "driving a commercial motor vehicle while under the influence of alcohol," as "committing any one (1) or more of the following acts in a commercial motor vehicle":
>
> > (A) Driving a commercial motor vehicle while the person's blood alcohol concentration is four-hundredths of one percent (0.04%) or more;
> >
> > (B) Driving while intoxicated in violation of [Ark. Code Ann.] § 5-56-103; or
> >
> > (C) Refusal to undergo such testing as is required by [Ark. Code Ann.] § 5-65-202.

> Ark. Code Ann. § 27-23-103(15) (Supp. 2009). Having an "alcohol-related enforcement contact" is clearly not included within this definition.
>
> In addition, the effect of the dismissal of the underlying criminal charges is different in Arkansas than in Missouri. Arkansas law, like Missouri law, provides for suspension of licensure upon an arrest for driving under the influence. *See* Ark. Code Ann. § 5-65-402(a)(1)(A), (B)(i) (Supp. 2009). An acquittal or dismissal of a charge of driving under the influence, however, "serves to reverse the suspension, disqualification, or revocation of the driver's license suspended or revoked under this section." Ark. Code Ann. § 5-65-402(d)(2)(B)(i) (Supp. 2009). In Missouri, on the other hand, an acquittal or dismissal on a charge of driving under the influence does not preclude administrative revocation of a driver's license. *See* Mo. Rev. Stat. § 302.505.3. There is no provision in the Missouri statute for reversal of the suspension in such circumstances.
>
> These differing definitions of what constitutes "being under the influence of alcohol as prescribed by state law" and the effect of a later dismissal of the criminal charges are what present the difficulty in this case, and it is why the parties in this appeal disagree so vehemently about whether Missouri or Arkansas law applies to the controversy. APP 13-16, (citations and footnotes omitted).

Per the dissent, if the DWI stop had instead occurred in Arkansas (and the charge later dismissed), and Petitioner then transferred his CDL to Missouri – and Missouri relied upon Arkansas' law in determining the FMCSR's application – Petitioner would not have a

disqualifying conviction. Yet because the FMCSR does not provide which State's law would apply in that case, Missouri could just as easily apply Missouri's substantive law to the situation, resulting in Petitioner again having a "conviction" – thus the arbitrary and unpredictable application of the FMCSR.

That the FMCSR provides no guidance to the States regarding this issue is fundamentally problematic to the meaningful application of the FMCSR, as between the States. Arkansas' hybrid application of Arkansas and Missouri law is not based upon any rule set out in the FMCSR, and this Court should grant review of this issue to provide authoritative direction for the several States.

While the Arkansas opinion does not cite any federal case law, it is clear that the opinion is based upon Arkansas' interpretation of how the FMCSR should be applied.

> [When a State] court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. *Michigan v. Long*, 463 U. S. 1032, 1040-41 (1983).

Clearly, the Arkansas Supreme Court decided Petitioner's case on the basis that the federal law, here the FMCSR, required it to do so, thus warranting this Court's review.

An administrative finding that Petitioner was arrested for DWI is not a "conviction" under the FMCSR:

The FMCSR mandates disqualification of one's CDL only when the person is *convicted* of driving under the influence as defined by State law. "The starting point in statutory interpretation is 'the language [of the statute] itself.'" *United States* v. *James*, 478 U. S. 597, 604 (1986) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975)). 49 CFR § 384.231 directs that

> a State must satisfy the requirement of this subpart that the State disqualify a person required to have a CDL who is *convicted* of an offense or offenses necessitating disqualification under § 383.51 of this subchapter. (emphasis added).

49 CFR § 383.51(b)(1), in turn, requires in relevant part that a driver must be "convicted of . . . [b]eing under the influence of alcohol as prescribed by *State law* . . . ."(emphasis added).

The Missouri Department of Revenue, an administrative tribunal, made the finding that Petitioner had been *arrested* upon probable cause to believe that he was driving a motor vehicle while his alcohol concentration was at or above the limit required by 302.505, RSMo. At no time did a Missouri *court* find that Petitioner was "under the influence as prescribed by [Missouri's] State law."

Arkansas in turn determined Missouri's action to be tantamount to a conviction for purpose of the FMCSR. As a practical matter, Arkansas interpreted the fact that

Missouri *suspended* Petitioner's license as the conviction – not that Petitioner's arrest was the conviction – wholly contrary to the plain language of the relevant FMCSR regulations.

The Arkansas Supreme Court overstepped the boundaries of statutory interpretation in this instance. This Court has long held that unnecessary statutory interpretation is an improper undertaking when the language in question is unambiguous.

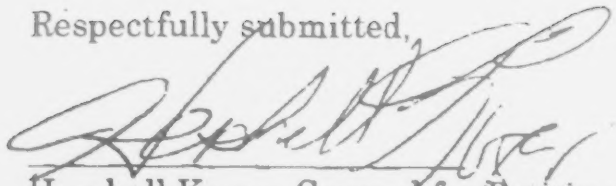
> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. Where the language [of the statute] is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Caminette v. United States*, 242 U.S. 470, 485 (1917)(citations omitted).

The Arkansas court's overreaching in the interpretation of the unambiguous language of the FMCSR warrants review by this Court.

CONCLUSION

Wherefore, Petitioner submits that the Arkansas Supreme Court has decided important questions of federal law that have not been, but should be, settled by this Court, and that this Court should grant the petition for writ of certiorari in this matter, to allow Petitioner to brief and appeal these questions on the merits.

Respectfully submitted,



Hershell Koger, Counsel for Petitioner
128 Sunset Drive, P.O. Box 1148
Pulaski, TN 38478
(931) 309-1534
kogerlaw@hotmail.com

APP 1

Cite as 2010 Ark. 455

SUPREME COURT OF ARKANSAS

No. 10-275

TROY BURDINE, APPELLANT

v.

ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION; RICHARD WEISS, DIRECTOR, APPELLEE,

Opinion Delivered November 18, 2010
APPEAL FROM THE BENTON COUNTY CIRCUIT COURT, NO. CV-2009-1237-4, HON. JOHN R. SCOTT, JUDGE

PAUL E. DANIELSON, Associate Justice

Appellant Troy Burdine appeals from the circuit court's order affirming appellee Arkansas Department of Finance and Administration's Office of Driver Services's (DFA) decision disqualifying his commercial driver's license (CDL). He asserts that the circuit court erred in so affirming. We affirm the circuit court's order.

According to the record, Burdine was arrested in Missouri on or about July 1, 2007, and charged with driving while intoxicated. That charge was nolle prossed, and on October 23, 2007, the Missouri Department of Revenue (MDR) held an administrative hearing, which resulted in a suspension of Burdine's driving privileges. In its findings of fact and conclusions of law, the MDR found,

in pertinent part:

> 2. The sole issue to be decided is whether by a preponderance of the evidence, the person was driving a vehicle pursuant to the circumstances set out in Section 302.505, RSMo.
>
> . . . .
>
> 4. Based upon the preponderance of the evidence presented at the administrative hearing, Petitioner is found to have been arrested/stopped upon probable cause to believe Petitioner was driving a motor vehicle while the alcohol concentration in the blood was at or above the limit required by Section 302.505, RSMo, or if under age twenty-one, was stopped while operating a motor vehicle with a blood alcohol content of .02% or more by weight, and the Notice of Suspension/Revocation was therefore properly issued to or served upon Petitioner pursuant to Section 302.515 or 302.520, RSMo.[1]
>
> 5. Administrative suspension or revocation of Petitioner's privilege to drive in the State of Missouri is required by Sections 302.505 and 302.525, RSMo.[1]

Burdine subsequently moved to Arkansas and requested that his CDL be transferred from Oklahoma. On February 3, 2009, DFA notified Burdine that his commercial driving privilege would be disqualified on February 17, 2009, "for serious traffic violation(s)." It further notified him that a hearing had been scheduled for

---

1 Burdine did not appeal the administrative decision to the Missouri circuit court.

him on the same date. Subsequent notifications were also sent, and, eventually, a hearing was held on April 21, 2009. A hearing summary was then issued, which stated, in pertinent part:

> STATUTE NUMBER AND CONCLUSION OF LAW:
>
> § 27-23-112 requires disqualification of commercial driving privilege for 1 year for a first offense of DWI, CMV DWI @.04, or refuse test IAW § 27-23-112(b)(1)(B) and IAW § 27-23-103(9). "Conviction" means an unvacated adjudication of guilt, a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal.
>
> DECISION OF HEARING OFFICER:
>
> This is a contested hearing. Atty Bickett states that there is no conviction on licensee's driving record. The DWI in Missouri was dismissed by prosecutor nolle pros. The Office states the Missouri Dept. of Rev constitutes a "conviction" of the Missouri DUI offense for the purposes of disq. of licensee's commercial driving privileges and because Missouri did not take action on the CDL, AR must impose the disq. pursuant to § 384.206 & § 384.231 of the Federal Motor Carrier Safety Regulations. Atty Bickett said the interpretation of the fed codes as listed above are misinterpreted in whole or by part. Atty Bickett states that Missouri did in fact impose a restriction of licensee's driving privileges therefore Arkansas must give full faith and credit to Missouri's decisions. Under the codes listed above, further reading of the codes does not disqualify licensee. The

> Office will uphold the disqualification.
>
> REINSTATEMENT REQUIREMENT:
>
> May surrender CDL and downgrade to an NCL. CDL is disqualified from 04/21/09 to 04/21/10. Must retest to qualify for new CDL.

On April 21, 2009, Burdine filed a petition for de novo review in the circuit court. In it, Burdine asserted that the State could not meet its burden of proving that his driving privileges should be disqualified as a result of his arrest for DWI, which charges were dismissed with prejudice, and prayed that his CDL privileges be reinstated during the pendency of the circuit court's review.[2] DFA answered that the dismissal of Burdine's criminal charge was immaterial due to the fact that Missouri law provided that the disposition of criminal charges shall not affect the suspension or revocation of an individual's driver's license. It further contended that its hearing officer correctly determined that disqualification of Burdine's driving privileges was required.

A hearing was held on Burdine's petition on November 3, 2009, at which time the circuit court heard arguments from both parties and ruled orally from the bench:

> The record is also deficient as to whether or not Missouri told Oklahoma of the administrative tribunal's findings of fact and conclusions of law suspending the plaintiff's driver's license from

---

2 The circuit court did order a reinstatement of Burdine's commercial driving privileges and stayed his disqualification that same day.

November 14th, 2007 to February 12th, 2008. It is the finding of this Court that the Missouri agency was an authorized administrative tribunal, and that its finding is tantamount to a conviction.

Oklahoma did not suspend the plaintiff's commercial driver's license as man – mandated by the Code of Federal Regulation. When the plaintiff began the renewal process in Arkansas in January 2009, all of the hands shook and the defendant's convict – the plaintiff's conviction in Missouri became known. Arkansas suspended his driver's license. That suspension was reduced to the Driver Control Hearing Summary, Plaintiff's Exhibit 1.

It is the finding of this Court that the Department of Finance and Administration Office of Driver Services' suspension is to be upheld for a period of nine months from the entry of an order in this matter, giving the plaintiff credit for the uncontroverted suspension he experienced from November 14th, 2007 to February 12th, 2008.

On November 30, 2009, the circuit court issued its order, in which it found, in pertinent part:

3. As a result of Petitioner's July 1, 2007 arrest for DWI, in an October 30, 2007 administrative proceeding before the Missouri Department of Revenue (MDOR), the MDOR suspended Petitioner's driving privileges for a period of three (3) months. The October 30, 2007 administrative decision constitutes a "conviction" of his July 1, 2007 arrest for DWI for purposes of Petitioner's CDL. Neither the MDOR or the State of Oklahoma disqualified

Petitioner's CDL.

4. Petitioner transferred his CDL to the State of Arkansas on January 22, 2009. Respondent searched Petitioner's driving record and determined neither the MDOR or the State of Oklahoma disqualified Petitioner's CDL as a result of his July 1, 2007 arrest for DWI. Pursuant to 49 C.F.R. §§ 384.206 and 384.231, Respondent notified Petitioner that his CDL would be disqualified by Respondent for one (1) year.

5. On April 21, 2009, Respondent's Office of Driver Control issued its administrative decision disqualifying Petitioner's CDL for one (1) year.

6. This Court hereby affirms the April 21, 2009 decision of Respondent's Office of Driver Control disqualifying Petitioner's CDL. Petitioner's commercial driver's license (CDL) shall be disqualified for one (1) year, with credit for three (3) months already served. The disqualification of Petitioner's CDL shall commence upon the filing of this Order with the Circuit Clerk.

The circuit court also entered an order staying Burdine's disqualification pending any appeal. Burdine filed a timely notice of appeal and now appeals.

In this appeal, Burdine challenges the circuit court's order affirming the disqualification of his CDL by DFA's Office of Driver Services. Specifically, Burdine argues that the suspension of his driver's license in Missouri was not a conviction for driving while intoxicated warranting disqualification. He contends that the MDR's administrative finding of DUI was not a conviction under

Arkansas law, and, he asserts, the Federal Motor Carrier Safety Regulations require a one-year suspension only when a person is convicted of driving under the influence of alcohol as defined by state law. In addition, he maintains that any consideration of the MDR administrative finding as a conviction was a violation of his due process rights. DFA avers that Burdine's CDL was properly disqualified in accordance with federal regulations. It maintains that upon receipt of Burdine's application for transfer of his CDL, it requested his record in accord with 49 C.F.R. § 384.206(a)(2) and discovered the Missouri administrative DUI. It urges that in order to comply with federal law, it was required to disqualify Burdine's CDL due to his DUI conviction, no previous disqualification for the conviction had occurred. It further points out that Arkansas statutory law does not control, as it imposed a federally mandated disqualification comporting with federal regulations.

Burdine appealed to the circuit court pursuant to Ark. Code Ann. § 27-16-913(a) (Repl. 2008), which permits

> [a]ny person denied a license or whose license has been suspended or revoked by the Office of Driver Services, within thirty (30) days of receipt of the decision by the office to deny, suspend, or revoke the license, may file a de novo petition of review in the Pulaski County Circuit Court or the circuit court in the county where the licensee or interested person resides.

Pursuant to the statute, the circuit court is vested with jurisdiction to determine whether the petitioner is entitled to a license or whether the decision of the hearing officer should be affirmed, modified or reversed. See Ark. Code

Ann. § 27-16-913(d). We must review the circuit court's order and determine whether the circuit court's findings were clearly erroneous. See Ark. R. Civ. P. 52(a) (2010). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court based on the entire evidence is left with a firm conviction that a mistake has been committed. See PH, LLC v. City of Conway, 2009 Ark. 504, ___ S.W.3d ___. Disputed facts and determinations of credibility are within the province of the fact-finder. See id.

Arkansas Code Annotated § 27-23-108(a)(1)(A) (Repl. 2008) provides that

> *[t]o the extent permitted by federal law and regulation*, a person may be issued a commercial driver license only if that person has:
>
> (i) Passed a knowledge and skills test for driving a commercial motor vehicle that complies with minimum federal standards established by federal regulation enumerated in 49 C.F.R., part 383, subparts G. and H.; and
>
> *(ii) Satisfied all other requirements imposed by state or federal law or regulation.*

(Emphasis added.) Part 384 of Title 49 of the Code of Federal Regulations governs state compliance with commercial driver's license programs. Its purpose is "to ensure that the States comply" with the Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. § 31311(a), and the part includes "the minimum standards for the actions States must take to be in substantial compliance" with the requirements of § 31311(a). 49 C.F.R. §

384.101(a, b(1)).[3] The rules in the part apply to all states. See 49 C.F.R. § 384.103.

Pursuant to 49 C.F.R. § 384.206(a)(2), an issuing state, prior to the initial or transfer issuance of a CDL, must require an applicant to provide the names of all states in which the applicant was previously licensed and request a complete driver record from all states in which the applicant was licensed within the previous ten years. In the event a state obtains adverse information regarding the applicant, the state must "promptly implement the disqualifications." 49 C.F.R. § 384.206(b)(2). DFA did so in the instant case.

In this case, the search of Burdine's driver records by DFA revealed the administrative DUI from Missouri, but no disqualification record. Under 49 C.F.R. § 384.215, a state must disqualify from operating a commercial motor vehicle for no less than one year each person who is convicted of a disqualifying offense, as specified in 49 C.F.R. § 383.51. Table 1 of § 383.51 provides that if a driver operates a motor vehicle and is convicted of "[b]eing

---

3 The State of Arkansas has recognized and implemented the Commercial Motor Vehicle Safety Act of 1986 through the enactment of the Arkansas Uniform Commercial Driver License Act. See Ark. Code Ann. §§ 27-23-101 – 27-23-126 (Repl. 2008 & Supp. 2009). In addition, "[a]ll rules and safety regulations now or hereafter prescribed and adopted by the U.S. Department of Transportation, Federal Highway Administration, applicable to motor vehicles under the Federal Motor Carrier Safety Regulations as found in 49 C.F.R. Parts 383 through 399, not in conflict with the laws of the State of Arkansas," were adopted prescribed "as the safety rules and regulations applicable to the interstate and intrastate operations of motor vehicles under the jurisdiction of" the Arkansas Highway and Transportation Commission. 001-00-004 Ark. Code R. 17.1 (Weil 2000).

under the influence of alcohol as prescribed by State law," the CDL holder must be disqualified from operating a commercial motor vehicle for "1 year" for a first conviction "while operating a non-CMV."

While Burdine argues that his administrative DUI did not constitute a conviction, his argument is without merit, as 49 C.F.R. § 383.5 defines "conviction" as

> an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

Here, the finding by the MDR, an administrative tribunal, was that Burdine had violated or failed to comply with Missouri law; thus, the finding was a conviction for purposes of the federal regulations.[4] According to the

---

[4] Burdine argues in his brief to this court that Arkansas law does not recognize an administrative suspension as a conviction for the criminal offense of driving while intoxicated. However, while not pertinent to our analysis, we note that for purposes of the Arkansas Uniform Commercial Driver License Act,

> "[c]onviction" or "convicted" means an unvacated adjudication of guilt, a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court,

records obtained by DFA, no disqualification had been previously implemented for Burdine's DUI conviction by the MDR, as required by the foregoing regulations. For that reason, DFA disqualified Burdine's CDL for one year, as required by the federal regulations recognized and adopted by this state and set forth above. The circuit court so found, and we cannot say that it clearly erred in doing so.

Pursuant to Ark. Code Ann. § 27-23-108(c) (Repl. 2008),

> [a] commercial driver license, special commercial license, restricted commercial license, temporary commercial license, provisional commercial license, or commercial driver instruction permit may not be issued to a person while the person is subject to a disqualification from driving a commercial motor vehicle, or while the person's driver license is suspended, revoked, or cancelled in any state; nor may a commercial driver license be issued to a person who has a commercial driver license or any other driver license issued by any other state unless the person first surrenders all such licenses, which must be returned to the issuing state(s) for cancellation.

> the payment of a fine, court cost, or court order, or violation of a condition of release without bail, regardless of whether or not the penalty was rebated, suspended, or prorated.

Ark. Code Ann. § 27-23-103(9) (Supp. 2009). We further note that the Missouri Supreme Court has also held, for purposes of Missouri's Commercial Driver's License Act, that the suspension of one's base driver's license constitutes a conviction for driving under the influence of alcohol, which is a first violation meriting disqualification of a person's commercial driver's privilege for a period of not less than one year. *See Strup v. Director of Revenue*, 311 S.W.3d 793 (Mo. 2010).

Because the record demonstrates that Burdine was subject to a disqualification from driving a commercial motor vehicle, it is clear to this court that the circuit court did not err in finding that the DFA properly disqualified Burdine's CDL.

While Burdine also appears to raise a due-process argument, our review of the record reveals that he failed to raise and develop that argument before the circuit court. It is well settled that this court will not address an argument raised for the first time on appeal, even a constitutional argument. *See Davis v. State*, 2009 Ark. 478, ___ S.W.3d ___; Hatchell v. Wren, 363 Ark. 107, 211 S.W.3d 516 (2005). For all of the foregoing reasons, we affirm the circuit court's order.

Affirmed.

WILLS, J., concurs.

WILLS, Justice, concurring. The majority attempts to resolve this controversy by reference to federal law alone. I cannot agree with that analysis because the federal regulations require reference to disqualifying offenses "as prescribed by state law." In my view, the majority implicitly relies on Missouri law to determine this controversy. I believe that the application of Arkansas law would require reversal of the circuit court's decision, but we have not been presented with any sufficient basis to apply Arkansas law to this controversy. I therefore reluctantly concur in the opinion.

The majority concludes that the Missouri Department of Revenue (MDR) found that Burdine

violated or failed to comply with Missouri law and that such finding constituted a conviction. ("The finding by the MDR, an administrative tribunal, was that Burdine had violated or failed to comply with Missouri law.") The actual finding that the MDR made, however, was that Burdine was "found to have been arrested/stopped upon probable cause to believe [he] was driving a motor vehicle while the alcohol concentration in the blood was at or above [the limit required by Missouri law]." The Department then stated merely that "[a]dministrative suspension or revocation . . . is required by Sections 302.505 and 302.520 RSMo." I cannot agree that the finding of the MDR, standing alone, evidences a violation of Missouri law or that it is "tantamount" to a conviction of a "disqualifying offense." Deeper reference to federal law and the laws of Missouri is necessary to reach that conclusion.

As an initial matter, the pertinent federal regulations require a state to disqualify a person who is "convicted," as defined in 49 C.F.R. § 383.5, of a "disqualifying offense" specified in 49 C.F.R. § 383.51. See 49 C.F.R. § 384.215. Section 383.51 sets out the disqualification periods for various offenses, including "being under the influence of alcohol as prescribed by state law." 49 C.F.R. § 383.51, Table 1 (emphasis added). The statute is silent, however, as to which state's law governs and prescribes the disqualifying offense where the conduct occurs in one state and the licensure action occurs in another state.

The conduct of being stopped on probable cause for driving under the influence and a later suspension based on that conduct, standing alone, constitutes a disqualifying event under Missouri law, see Mo. Rev. Stat.

§ 302.755.1(1); Mo. Rev. Stat. § 302.525.3,[5] and is defined in Missouri's Commercial Driver's License Act as "driving under the influence of alcohol." This rule is illustrated in *Strup v. Director of Revenue*, 311 S.W.3d 793 (Mo. 2010), cited by the majority. Missouri's commercial driver's license (CDL) law defines "driving under the influence of alcohol" as including "[h]aving any state, county, or municipal alcohol-related enforcement contact" pursuant to section 302.505, see Mo. Rev. Stat. § 302.700(13)(e),[6] which includes "any suspension or revocation under sections 302.500 to 302.540." See also Baber v. Director of Revenue, 317 S.W.3d 680 (Mo. App. 2010).

This is not the law in Arkansas. Arkansas's CDL law defines "driving a commercial motor vehicle while under

---

[5] Section 302.755.1(1) provides that a "person is disqualified from driving a commercial motor vehicle for a period of not less than one year if convicted of a first violation of . . . [d]riving a motor vehicle under the influence of alcohol or a controlled substance, *or of an alcohol-related enforcement contact as defined in subsection 3 of section 302.525*." (Emphasis added.) Subsection 3 of section 302.525, in turn, defines "alcohol-related enforcement contacts" as including:

> *any suspension or revocation under sections 302.500 to 302.540*, any suspension or revocation entered in this or any other state for a refusal to submit to chemical testing under an implied consent law, and any conviction in this or any other state for a violation which involves driving while intoxicated, driving while under the influence of drugs or alcohol, or driving a vehicle while having an unlawful alcohol concentration.

(Emphasis added.)

[6] Subsection 13 of Mo. Rev. Stat. § 302.700 was amended in 2004 to include, in the definition of "driving under the influence of alcohol," the driving of either a commercial or a noncommercial motor vehicle. See 2004 Mo. Legis. Serv. S.B. 1043. In this case, Burdine was driving his personal vehicle at the time he was stopped.

the influence of alcohol," as "committing any one (1) or more of the following acts in a commercial motor vehicle":

> (A) Driving a commercial motor vehicle while the person's blood alcohol concentration is four-hundredths of one percent (0.04%) or more;
>
> (B) Driving while intoxicated in violation of [Ark. Code Ann.] § 5-56- 103; or
>
> (C) Refusal to undergo such testing as is required by [Ark. Code Ann.] § 5-65-202.

Ark. Code Ann. § 27-23-103(15) (Supp. 2009). Having an "alcohol-related enforcement contact" is clearly not included within this definition.

In addition, the effect of the dismissal of the underlying criminal charges is different in Arkansas than in Missouri. Arkansas law, like Missouri law, provides for suspension of licensure upon an arrest for driving under the influence. See Ark. Code Ann. § 5-65- 402(a)(1)(A), (B)(i) (Supp. 2009). An acquittal or dismissal of a charge of driving under the influence, however, "serves to reverse the suspension, disqualification, or revocation of the driver's license suspended or revoked under this section." Ark. Code Ann. § 5-65- 402(d)(2)(B)(i) (Supp. 2009). In Missouri, on the other hand, an acquittal or dismissal on a charge of driving under the influence does not preclude administrative revocation of a driver's license. See Mo. Rev. Stat. § 302.505.3. There is no provision in the Missouri statute for reversal of the suspension in such circumstances.

These differing definitions of what constitutes "being

under the influence of alcohol as prescribed by state law" and the effect of a later dismissal of the criminal charges are what present the difficulty in this case, and it is why the parties in this appeal disagree so vehemently about whether Missouri or Arkansas law applies to the controversy. Neither party, however, cites any particularly helpful authority to resolve that issue. Nonetheless, the majority apparently concludes that the federal regulations alone are dispositive of the issue; however, it also relies on Missouri law by way of citation to the *Strup* decision and indicates that Arkansas law is not relevant to the analysis.

Neither party has cited this court to what may be the controlling law on this particular issue—the Arkansas Driver License Compact. See Ark. Code Ann. § 27-17-101 (Repl. 2008). Both Arkansas and Missouri are parties to the compact. See Mo. Rev. Stat. § 302.600. Among the purposes of the compact is "[p]romot[ion of] compliance with the laws, ordinances, and administrative rules and regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where such operators drive motor vehicles." Ark. Code Ann. § 27-17-101, Article I(b)(1) (Repl. 2008). In addition, the compact is intended to

> [m]ake the reciprocal recognition of licenses to drive and eligibility therefor more just and equitable by considering the overall compliance with motor vehicle laws, ordinances, and administrative rules and regulations as a condition precedent to the continuance or issuance of any license by reason of which the licensee is authorized or permitted to operate a motor vehicle in any of the party states.

The compact has been adopted by forty-five states and has been interpreted as applying to commercial drivers' licenses as well as operators' licenses. See Strong v. Neth, 267 Neb. 523, 676 N.W.2d 15 (2004).

The compact contains a definition of "conviction" similar to that found in 49 C.F.R. § 383.5, defining the word as:

> a conviction of any offense related to the use or operation of a motor vehicle which is prohibited by state law, municipal ordinance, or administrative rule or regulation, or a forfeiture of bail, bond, or other security deposited to secure appearance by a person charged with having committed any such offense, and which conviction or forfeiture is required to be reported to the licensing authority.

Ark. Code Ann. § 27-17-101, Article II(c). The compact further requires licensing states to give effect to convictions that occurred in other compact states, as follows:

> (a) The licensing authority in the home state, for the purposes of suspension, revocation, or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to Article III of this compact, as it would if such conduct has occurred in the home state, in the case of convictions for:
>
> . . . .
>
> (2) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders

> the driver incapable of safely driving a motor vehicle[.]
>
> . . . .
>
> (c) If the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in subdivision (a) of this article, such party state shall construe the denominations and descriptions appearing in subdivision (a) hereof as being applicable to and identifying *those offenses or violations of a substantially similar nature*, and the laws of such party state shall contain such provisions as may be necessary to ensure that full force and effect is given to this article.

(Emphasis added.) Thus, in certain instances, the Compact requires a licensing authority of the home state to give the same effect to the conduct reported as if such conduct had occurred in the home state.

It may be the case that the pertinent Arkansas and Missouri statutes are not of a "substantially similar nature," for purposes of the Compact. As noted above, however, neither party has cited this court to the Compact or addressed its potential impact or applicability. It is the appellant's burden to demonstrate that reversible error exists. *See Qualls v. Ferritor, supra.* I therefore must reluctantly concur and agree to affirm the circuit court.

Missouri Revised Statutes

Chapter 302
Drivers' and Commercial Drivers' Licenses
Section 302.505

Determination by department to suspend or revoke license, when made, basis--final, when.

302.505. 1. The department shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe such person was driving a motor vehicle while the alcohol concentration in the person's blood, breath, or urine was eight-hundredths of one percent or more by weight, based on the definition of alcohol concentration in section 302.500, or where such person was less than twenty-one years of age when stopped and was stopped upon probable cause to believe such person was driving while intoxicated in violation of section 577.010, or driving with excessive blood alcohol content in violation of section 577.012, or upon probable cause to believe such person violated a state, county or municipal traffic offense and such person was driving with a blood alcohol content of two-hundredths of one percent or more by weight.

2. The department shall make a determination of these facts on the basis of the report of a law enforcement officer required in section 302.510, and this determination shall be final unless a hearing is requested and held. If a hearing is held, the department shall review the matter and make a final determination on the basis of evidence received at the hearing.

3. The determination of these facts by the department is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any suspension or revocation under this section.

ARKANSAS CODE ANNOTATED

A.C.A §27-23-103. Definitions.

As used in this subchapter:

. . . .

(9) "Conviction" or "convicted" means an unvacated adjudication of guilt, a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine, court cost, or court order, or violation of a condition of release without bail, regardless of whether or not the penalty was rebated, suspended, or prorated;

. . . .

ARKANSAS CODE ANNOTATED

A.C.A. §27-23-112. Disqualification and cancellation.

(a)(1) A driver or holder of a commercial driver license who is disqualified shall not drive a commercial motor vehicle.

. . . .

(3) A driver is subject to disqualification sanctions designated in subsections (b) and (c) of this section if the holder of a commercial driver license drives a commercial motor vehicle or noncommercial motor vehicle and is convicted of violations.

(4) Determining first and subsequent violations. For purposes of determining first and subsequent violations of the offenses specified in this section, each conviction for any offense listed in this section resulting from a separate incident, whether committed in a commercial motor vehicle or noncommercial motor vehicle, must be counted.

. . . .

(b) Disqualification for major offenses. Depending upon the type of vehicle a driver is operating at the time of the violation, a driver shall be disqualified as follows:

(1) If a driver operates a motor vehicle and is convicted of being intoxicated by drugs or alcohol as provided by 5-65-103 or refusing to submit to chemical testing as provided by 5-65-202, the driver shall be

disqualified as follows:

. . . .

(B) For a first conviction or refusal to be tested while operating a noncommercial motor vehicle, a commercial driver license holder shall be disqualified from operating a commercial motor vehicle for one (1) year;

. . . .

(2) If a driver operates a motor vehicle and is convicted of having a blood alcohol concentration in violation of 27-23-114(a), the driver shall be disqualified as follows:

(A) For a first conviction or refusal to be tested while operating a commercial motor vehicle a person required to have a commercial driver license and a commercial driver license holder shall be disqualified from operating a commercial motor vehicle for one (1) year;

. . . .

EXCERPT OF ABSTRACT OF *DE NOVO* HEARING

(Abstract of testimony of Anita Boatman, DFA representative):

> There was no circuit court conviction. I testified that even though there was not a criminal conviction, there is language for an authorized administrative tribunal. The administrative tribunal in not authorize to make criminal findings. Criminal would be separate from the administrative. As far as criminal charges, we make a decision at the administrative level based on a preponderance of the evidence rather than shadow of a doubt or proven guilty. We cannot impose criminal penalties, jail, or fines. Missouri has a specific statute in their statutory regulation that says they can take this action regardless of the outcome of the criminal case. Arkansas does not have a similar statute.
>
> [Abstractor's Note: Here, Mr. Gehring [for the State] raises an objection to relevancy.
>
> > Mr. Gehring: Objection, Your Honor, as to relevance. This offense occurred in the state of Missouri. I do not think that the procedures and the statutory law with regard to how Arkansas would treat it if the offense occurred here is proper. I think the proper law with regard to whether or not the administrative finding in Missouri was proper would be controlled exclusively by federal law and Missouri law.

Mr. Virden: [For Mr. Burdine] Your Honor, my reply to that is this is the state of Arkansas suspending the man's driving privileges based on Arkansas law. They do not have the authority to enforce Missouri law. It is an Arkansas administrative agency. It is an appeal to an Arkansas circuit court, and it is application of Arkansas law. They are saying that Arkansas law is the same as Missouri law, and they are required to do this pursuant to Arkansas law. We are not in federal court. That is my reason I will develop in an argument, bit that is the reason I ask the question.

Mr. Gehring: Judge, this is a hybrid where the person, Mr. Burdin, came to the state of Arkansas to transfer his CDL. We had to have state administrative action based upon what the federal government requires of the state of Arkansas to do. His procedures for obtaining a hearing and also for circuit court review are a part of Arkansas law. However, how Arkandsas would have treated the offense if the offense had occurred in Arkansas, the application of Arkdansas law to that hypothertical is not relevant in this case. [De Novo Transcript, pp. 65-67]

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 20 2011
OFFICE OF THE CLERK

No. 10-1156

IN THE

Supreme Court of the United States

TROY BURDINE,

Petitioner,

v.

ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION, RICHARD WEISS, DIRECTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION

MARTHA HUNT
PAUL M. GEHRING*
OFFICE OF REVENUE LEGAL COUNSEL
P.O. Box 1272, Room 2380
Little Rock, Arkansas 72203
(501) 682-7030
paul.gehring@dfa.arkansas.gov

Counsel for Respondent

**Counsel of Record*

236300

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

QUESTIONS PRESENTED

1. Regarding the Federal Motor Carrier Safety Regulations, when an alleged disqualifying offense occurs in one State, and the licensure/disciplinary action occurs in another State, which of the two States' substantive law applies in determining whether the alleged offense occurred?

2. Does an administrative determination that a person was arrested based upon probable cause that the person was driving while intoxicated, equate to a "conviction" as defined in the Federal Motor Carrier Safety Regulations?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The corporate disclosure required by Rule 29.6 does not apply in this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	11
Petitioner was arrested for DWI in Missouri, and therefore, the disqualification of Petitioner's CDL was controlled by the Federal Motor Carrier Safety Regulations, and not by reference to the substantive law of Arkansas	11
The unambiguous language of 49 C.F.R. § 383.5 clearly recognizes that an administrative determination of the MDR that Petitioner violated or failed to comply with the law constitutes a "conviction" of DWI for purposes of disqualifying a CDL	22
CONCLUSION	26

TABLE OF CITED AUTHORITIES

Page

CASES

Burdine v. Arkansas Dep't of Fin. and Admin.,
2010 Ark. 455 (Ark. 2010) 10, 11, 15, 16

Miller v. Director of Revenue,
277 S.W.3d 29 (Mo.Ct.App. 2009) 17, 21, 22

Strup v. Director of Revenue,
311 S.W.3d 793 (Mo. banc 2010) 18, 20, 21, 22

FEDERAL REGULATIONS

49 C.F.R. § 383.5 ..... *passim*

49 C.F.R. § 383.51 ..... 1, 7, 12, 16

49 C.F.R. § 384.206 ..... *passim*

49 C.F.R. § 384.231 ..... *passim*

49 C.F.R. § 384.232 6

ARKANSAS STATUTES

Ark. Code Ann § 3-3-203 ..... 14, 15

Ark. Code Ann § 5-27-503 ..... 14, 15

Ark. Code Ann § 5-65-101 16

Cited Authorities

Page

Ark. Code Ann § 5-65-103 ..... 1, 14, 15, 16

Ark. Code Ann § 5-65-205 ..... 14, 15

Ark. Code Ann § 5-65-303 ..... 14, 15

Ark. Code Ann § 5-65-310 ..... 14, 15

Ark. Code Ann § 5-65-402 ..... *passim*

Ark. Code Ann § 27-16-913..... 13, 15

Ark. Code Ann § 27-23-103..... 16

Ark. Code Ann § 27-23-112..... 1, 16

Ark. Code Ann § 27-23-114..... 14, 15

MISSOURI STATUTES

RSMo § 302.500..... 20

RSMo § 302.505 ..... *passim*

RSMo § 302.515..... 4, 24

RSMo § 302.520..... 4, 24

RSMo § 302.525..... 4, 8, 20

Page

RSMo § 302.540 20

RSMo § 302.700 ..... *passim*

RSMo § 302.755 ..... 7, 18, 19, 20

RSMo § 577.10 3

COURT RULES

U.S. Supreme Court Rule 10(c) 1

U.S. Supreme Court Rule 15.2. 8

INTRODUCTION

Petitioner has failed to present an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(c). Moreover, Petitioner has failed to demonstrate that the Arkansas Trial Court or Arkansas Supreme Court interpreted an important question of federal law.

Petitioner suggests that this Court should decide whether or not Arkansas substantive law should apply to the disqualification of Petitioner's commercial driver's license ("CDL") as a result of a Driving While Intoxicated ("DWI") arrest that occurred in Missouri. As will be discussed in greater detail below, if a CDL holder is arrested in Arkansas for a violation of DWI, in violation of Ark. Code Ann. § 5-65-103, the person's CDL will also be disqualified for a period of one year pursuant to Ark. Code Ann. § 27-23-112 and 49 C.F.R. § 383.51(b)(1).

If the CDL holder is found "not guilty" of the Arkansas DWI offense, or if the charge is dismissed by the criminal court, Arkansas law provides that the disqualification be reversed by Respondent's Office of Driver Services. *See* Ark. Code Ann. § 5-65-402(d)(2)(B)(i). Conversely, Missouri law provides that the disqualification of a person's CDL as a result of a DWI arrest is independent of the adjudication of the criminal charges. *See* RSMo § 302.505.3.

In this case, Petitioner was arrested in Missouri for a violation of Missouri's DWI law. Despite the legal authorities relied upon by the Arkansas Supreme Court, Petitioner, without citation to any contrary legal authority,

requests this Court to fashion an absurd rule of law mandating that the directives of an Arkansas statute be imposed upon violations of a Missouri criminal statute, and that controlling Missouri statutes be disregarded.

In addition, Petitioner has asked this Court to interpret the definition of "conviction" as provided in 49 C.F.R. § 383.5 to preclude an administrative finding by a state agency. The plain language of 49 C.F.R. § 383.5 clearly contemplates that a finding by a state administrative agency may constitute a "conviction" for purposes of disqualification of a CDL. 49 C.F.R. § 383.5 provides, "Conviction means an unvacated adjudication of guilt, *or a determination that a person has violated or failed to comply with the law* in a court of original jurisdiction or by *an authorized administrative tribunal* [...]". (Emphasis added). Much like Petitioner's first point in his Petition, he provides no meaningful legal authority or analysis to support the proposition that the Arkansas Supreme Court incorrectly ruled that a finding by an administrative agency may constitute a "conviction" for CDL disqualification purposes.

Petitioner has failed to present an important question of federal law that has not been, but should be, settled by this Court. Accordingly, the Petition for Writ of Certiorai should be denied.

STATEMENT OF THE CASE

On July 1, 2007, Petitioner was arrested in McDonald County, Missouri, and charged with DWI, in violation of RSMo § 577.10. (R. 127, 131). The prosecuting attorney nolle prossed the criminal charge of DWI on October 15, 2007. (R. 7). Pursuant to Appelllant's request, the Missouri Department of Revenue, Driver License Bureau, ("MDR"), conducted an administrative hearing on October 23, 2007 regarding the suspension of Petitioner's driving privileges as a result of the DWI arrest. (R. 138-140). Petitioner did not personally appear at the hearing, but was represented by an attorney at the hearing. (R. 139). The MDR hearing officer made findings of fact and conclusions of law, which included, but was not limited to, the following:

> 2. The sole issue to be decided is whether by a preponderance of the evidence, the person was driving a vehicle pursuant to the circumstances set out in Section 302.505, RSMo.
>
> ...
>
> 4. Based upon the preponderance of the evidence presented at the administrative hearing, Petitioner is found to have been arrested/stopped upon probable cause to believe Petitioner was driving a motor vehicle while the alcohol concentration in the blood was at or above the limit required by Section 302.505, RSMo, or if under age twenty-one, was stopped while operating a motor vehicle with a blood alcohol content of .02% or more by weight,

> and the Notice of Suspension/Revocation was therefore properly issued to or served upon Petitioner pursuant to Section 302.515 or 302.520, RSMo.
>
> 5. Administrative suspension or revocation of Petitioner's privilege to drive in the State of Missouri is required by Sections 302.505 and 302.525 RSMo.
>
> NOW, THEREFORE, IT IS THE DECISION OF THE MISSOURI DEPARTMENT OF REVENUE, that the issuance of the Notice of Suspension/Revocation is SUSTAINED. Petitioner's privilege to drive in the State of Missouri is hereby suspended as authorized and required by Sections 302.505 and 302.525, RSMo.

(R. 140).

Petitioner's license suspension went into effect on November 14, 2007 and ran until February 12, 2008, a period of ninety (90) days. (R. 102). Regarding Petitioner's right to appeal the administrative findings, the MDR administrative decision also stated as follows:

> NOTICE
>
> If you do not agree with the decision made by the department, you may file a petition for Trial DeNovo in the Circuit Court in the county

> of arrest[1]. You must file the petition with the court by the effective date of your suspension/ revocation.
>
> *The Administrative Decision is independent of any criminal charges resulting from this arrest.*

Id. (Emphasis added).

In January 2009, Petitioner requested Respondent accept transfer of his CDL issued by the State of Oklahoma to the State of Arkansas. Upon transfer of Petitioner's CDL, Respondent, as required by 49 C.F.R. § 384.206(a)(2), reviewed Petitioner's driving record and noticed Petitioner's driving privileges had been suspended by the State of Missouri as a result of the July 1, 2007 DWI arrest, but Petitioner's CDL had not been disqualified. 49 C.F.R. § 383.5 defines "disqualification" as follows:

> *Disqualification* means any of the following three actions:
>
> (a) The suspension, revocation, or cancellation of a CDL by the State or jurisdiction of issuance.
>
> (b) Any withdrawal of a person's privileges to drive a CMV by a State or other jurisdiction as the result of a violation of State or local law relating to motor vehicle traffic control (other

1. Petitioner did not appeal the MDR administrative suspension of his driving privileges to a Missouri circuit court.

than parking, vehicle weight or vehicle defect violations).

(c) A determination by the FMCSA[2] that a person is not qualified to operate a commercial motor vehicle under part 391 of this chapter.

See also RSMo § 302.700.2(10).

49 C.F.R. § 384.206(a)(2) provides, in part:

(2) *Other States' records.* Before the initial or transfer issuance of a CDL to a person, and before renewing a CDL held by any person, the issuing State must:

(i) Require the applicant to provide the names of all States where the applicant has previously been licensed to operate any type of motor vehicle.

(ii) Within the time period specified in § 384.232, request the complete driver record from all States where the applicant was licensed within the previous 10 years to operate any type of motor vehicle.

Pursuant to 49 C.F.R. §§ 384.206 and 384.231, on February 3, 2009, Respondent notified Petitioner by letter that his CDL would be disqualified and scheduled an administrative hearing for February 17, 2009. (R. 111). 49 C.F.R. § 384.206(b) provides, in part:

---

2. Federal Motor Carrier Safety Administration.

> (b) *Required action.* Based on the findings of the State record checks prescribed in this section, the State of record must do one of the following as appropriate:
>
> (1) Issue, renew, upgrade or transfer the applicant's CDL;
>
> (2) *In the event a State obtains adverse information regarding the applicant,* ***promptly implement the disqualifications****, licensing limitations, denials, or penalties that are called for in any applicable sections of this subpart*[.] (Emphasis added).

Similarly, 49 C.F.R. § 384.231(b) states as follows:

> (b) *Required action — (1) CDL holders.* A State must satisfy the requirement of this part that the State disqualify a person who holds a CDL by, at a minimum, suspending, revoking, or canceling the person's CDL for the applicable period of disqualification.

49 C.F.R. § 383.51(b)(1) requires that a CDL holder's privilege to drive a commercial motor vehicle be disqualified for one year if the driver operates a motor vehicle and is convicted of being under the influence of alcohol as prescribed by State law. Similarly, RSMo § 302.755.1 states:

> A person is disqualified from driving a commercial motor vehicle for a period of not less than one year if convicted of a first violation of:

> (1) Driving a motor vehicle under the influence of alcohol or a controlled substance, or of an alcohol-related enforcement contact as defined in subsection 3 of section 302.525[.]

The February 17, 2009 administrative hearing was eventually rescheduled to April 21, 2009[3]. (R. 109-110). At the April 21, 2009 hearing, Respondent's hearing officer concluded as follows:

> Decision of Hearing Officer:
>
> This is a contested hearing. Atty Bickett states that there is no conviction on licensee's driving record. The DWI in Missouri was dismissed by prosecutor nolle pros. The office states the Missouri Dept. of Rev constitutes a "conviction" of the Missouri DUI offense for the purposes of disq. of licensee's commercial driving privileges and because Missouri did not take action on the CDL, AR must impose the disq. pursuant to § 384.206 and § 384.231 of the

---

3. Petitioner asserts in his Petition that Respondent's "Office of [Driver] Control effectively determined it did not know what to do regarding the matter, and referred [the matter] to their legal department." *See* Petition at 4. Pursuant to Sup. Ct. R. 15.2, Respondent is obligated to inform the Court of any misstatement of fact contained in the Petition. The February 17, 2009 administrative hearing was rescheduled to April 21, 2009 to provide Petitioner and Respondent's Office of Driver Control an opportunity to research whether the dismissal of the DWI by the Missouri criminal court would have any effect upon Respondent's obligation to disqualify Petitioner's CDL under the FMCSR. In the interim, Petitioner's CDL was not disqualified.

> Federal Motor Carrier Safety Regulations. Atty Bickett said the interpretation of the Fed codes as listed above are misinterpreted in whole or by part. Atty Bickett states that Missouri did in fact impose a restriction of licensee's driving privileges therefore Arkansas must give full faith and credit to Missouri's decisions. Under the codes listed above, further reading of the codes does not disqualify licensee. The office will uphold the disqualification.

(R. 12).

At the November 3, 2009 trial of this matter before the Benton County, Arkansas, Circuit Court, the Trial Court sustained the Respondent's hearing officer as follows:

> The Petitioner's commercial driver's license issued by the State of Oklahoma expired January 31, 2009. Defendant's Exhibit 1 demonstrates that the Plaintiff resided in Bentonville on the date of his arrest in Missouri on July 1, 2007. The record does not reflect when the plaintiff's commercial driver's license was issued by the State of Oklahoma.
>
> The record is also deficient as to whether or not Missouri told Oklahoma of the administrative tribunal's findings of fact and conclusions of law suspending the Plaintiff's driver's license from November 14, 2007 to February 12, 2008. It is the finding of this Court that the Missouri agency was an authorized administrative tribunal, and that its finding is tantamount to a conviction.

> Oklahoma did not suspend the Plaintiff's commercial driver's license as mandated by the Code of Federal Regulation. When the Plaintiff began the renewal process in Arkansas in January 2009, all of the hands shook and the Plaintiff's conviction in Missouri became known. Arkansas suspended his driver's license. That suspension was reduced to the Driver Control Hearing Summary, Plaintiff's Exhibit 1.
>
> It is the finding of the Court that the Department of Finance and Administration Office of Driver Services' suspension is to be upheld for a period of nine months from the entry of an order in this matter, giving the Plaintiff credit for the uncontroverted suspension he experienced from November 14, 2007 to February 12, 2008.

(R. 95-96).

Petitioner appealed the Trial Court's decision to the Arkansas Supreme Court, which affirmed the Trial Court's decision that the FMCSR mandated that Respondent disqualify Petitioner's CDL as a result of the MDR administrative finding[4]. *See Burdine v. Arkansas Dep't of Fin. and Admin.*, 2010 Ark. 455 (Ark. 2010). In so holding, the Arkansas Supreme Court recognized that the administrative finding of the MDR constituted a "conviction" for purposes of disqualifying Petitioner's CDL as follows:

---

4. Petitioner's Brief indicates there was a dissent filed in the Arkansas Supreme Court, which is incorrect. Rather, Justice Elana Wills filed a concurring opinion.

> Here, the finding by the MDR, an administrative tribunal, was that Burdine had violated or failed to comply with Missouri law; thus, the finding was a conviction for purposes of the federal regulations. According to the records obtained by DFA, no disqualification had been previously implemented for Burdine's conviction by the MDR, as required by the foregoing regulations. For that reason, DFA disqualified Burdine's CDL for one year, as required by the federal regulations recognized and adopted by this state and set forth above. The circuit court so found, and we cannot say that it clearly erred in doing so.

Burdine, 2010 Ark. 455 at 8. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

Petitioner was arrested for DWI in Missouri, and therefore, the disqualification of Petitioner's CDL was controlled by the Federal Motor Carrier Safety Regulations, and not by reference to the substantive law of Arkansas.

In Petitioner's first point in support of his Petition, Petitioner states, "The FMCSR does not provide which State's law substantively determines whether a 'conviction' has occurred[.]" *See* Petition at 7. Petitioner urges this Court to determine whether the substantive law of Missouri or Arkansas should apply to determine whether Petitioner was "convicted" of an offense of driving a motor vehicle while under the influence of alcohol for purposes

of disqualifying his CDL pursuant to Table 1 to 49 C.F.R. § 383.51(b). Petitioner's Brief contains no meaningful legal analysis or citation to authority in support of the proposition that reference to Arkansas substantive law would be proper in this circumstance. Any reference to Arkansas substantive law to determine whether a violation of a Missouri criminal statute occurred would be absurd.

As an initial matter, the definition of "conviction", for purposes of disqualifying a CDL pursuant to the FMCSR, is substantially similar to the definitions of "conviction" contained in Missouri and Arkansas law for CDL disqualification purposes. 49 C.F.R. § 383.5 defines "conviction" as follows:

> *Conviction* means an unvacated adjudication of guilt, or ***a determination that a person has violated or failed to comply with the law*** in a court of original jurisdiction or ***by an authorized administrative tribunal***, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated. (Emphasis added).

It is also noteworthy that the Missouri legislature has determined that any outcome in a criminal case has absolutely no effect upon any decision by the MDR to suspend or revoke any driving privilege. More specifically, RSMo § 302.505.3 states:

> The determination of these facts by the department *is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence.* The disposition of those criminal charges *shall not affect any suspension or revocation under this section.* (Emphasis added).

Petitioner asks only that this Court determine whether Arkansas law should apply because, had Petitioner been arrested for DWI in Arkansas and subsequently had the charge dismissed, Arkansas law would provide that the corresponding disqualification of Petitioner's CDL would be reversed. However, what Petitioner fails to recognize or address in his Petition is that the provision of Arkansas law that provides for the reversal of the suspension or disqualification of driving privileges upon a dismissal of the criminal charges *applies only to suspension or disqualification of driving privileges for violations of specific Arkansas criminal statutes. See generally* Ark. Code Ann. § 5-65-402.

The Arkansas legislature has provided two separate statutes to provide for *de novo* circuit court review of a decision of Respondent to suspend, disqualify, or revoke a driver's license. *See* Ark. Code. Ann. §§ 27-16-913 and 5-65-402. Ark. Code Ann. § 27-16-913(a) (Repl. 2008) provides as follows:

> Any person denied a license or whose license has been suspended or revoked by the Office of Driver Services, within thirty (30) days of receipt of the decision by the office to

> deny, suspend, or revoke the license, may file a de novo petition of review in the Pulaski County Circuit Court or the circuit court in the county where the licensee or interested person resides.

Ark. Code Ann. § 5-65-402 applies only to license suspensions, disqualifications, or revocations for violations of specified *Arkansas* criminal laws. More specifically, § 5-65-402 applies to violations for § 3-3-203(a) (Minor in Possession of Alcohol), § 5-27-503(a)(3) (Possession of Fraudulent ID to Purchase Alcohol), § 5-65-103 (Driving While Intoxicated), § 5-65-205 (Refusal to Submit), § 5-65-303 (Underage Driving While Under the Influence ("DUI")), § 5-65-310 (Underage Refusal to Submit), § 27-23-114(a)(1) (Commercial Motor Vehicle DWI), § 27-23-114(a)(2) (Commercial Motor Vehicle DUI); § 27-23-114(a)(5) (Commercial Motor Vehicle Refusal to Submit). *See* Ark. Code Ann. § 5-65-402(a)(1)(A)(Supp. 2009).

Petitioner hopes that this Court will determine that Ark. Code Ann. § 5-65-402(d)(2) should apply to both Petitioner's Missouri arrest and Missouri administrative driver's license suspension hearing. However, the plain reading of this Arkansas statute clearly demonstrates that this statute could not be applied to Petitioner's Missouri arrest. Ark. Code Ann. § 5-65-402(d)(2)(Supp. 2009) provides, in part, as follows:

> (2) Any decision rendered by a court of law for a criminal case arising from any violation of *§ 3-3-203(a), § 5-27-503(a)(3), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5)* shall affect the administrative suspension, disqualification, or revocation of the driver's license as follows:

> (A) A plea of guilty or nolo contendere or a finding of guilt by the court has no effect on any administrative hearing held under this section;
>
> (B) (i) An acquittal on the charges or a dismissal of charges serves to reverse the suspension, disqualification, or revocation of the driver's license suspended or revoked ***under this section***. (Emphasis added).

Clearly, in Ark. Code Ann. § 5-65-402, the Arkansas legislature has provided that only a driver charged with a violation of *specific Arkansas statutes*, i.e., Ark. Code Ann. §§ 3-3-203(a), 5-27-503(a)(3), 5-65-103, 5-65-205, 5-65-303, 5-65-310, 27-23-114(a)(1) or (2), and 27-23-114(a)(5), may have the administrative suspension, disqualification, or revocation of driving privileges imposed under Ark. Code Ann. § 5-65-402 reversed upon acquittal or dismissal of the charges. There is simply no provision in Arkansas law to reverse or disregard an out-of-state administrative license suspension decision as a result of an acquittal or dismissal of the criminal charges from an out-of-state court. Moreover, the Arkansas Supreme Court recognized that Ark. Code Ann. § 27-16-913 was the proper statute from which Petitioner could appeal the Respondent's administrative finding to circuit court. *See Burdine*, 2010 Ark. 455 at 5. The FMCSR does not address whether an acquittal or dismissal of the underlying criminal charges shall have any affect upon a disqualification of a CDL.

Petitioner's driving privileges were not suspended or disqualified for any offense enumerated in Ark. Code Ann. § 5-65-402(a)(1)(A) nor for any offense committed in the State of Arkansas. Rather, the *only* basis for the State of Arkansas to impose the disqualification of Petitioner's

CDL arose from Petitioner's transfer of his out-of-state CDL to Arkansas in January of 2009. Upon Petitioner's transfer of his CDL to Arkansas, 49 C.F.R. § 384.206(a)(2) required Respondent to search Petitioner's driver record. Upon discovery of the administrative suspension for the Missouri DWI, Respondent was required to impose the disqualification pursuant to 49 C.F.R. §§ 384.206(b)(2) and 384.231(b).

Even if Arkansas' statutory definition of "conviction" or the period Arkansas law provides for disqualification of a CDL for a DWI conviction is relevant to this case, it is noteworthy that Arkansas law *identically* mirrors federal law in these two respects. *Compare* Ark. Code Ann. § 27-23-103(9) to 49 C.F.R. § 383.5 ("conviction" defined with *exact* same terms); Ark. Code Ann. § 27-23-112(b)(1)(B) and 49 C.F.R. § 383.51 (CDL holder's privilege to drive a commercial motor vehicle is disqualified for one year if the driver operates a motor vehicle and is convicted of DWI).

In this case, neither the Trial Court's final order nor the Arkansas Supreme Court's November 10, 2010 opinion relied upon any Arkansas substantive law to impose the disqualification of Petitioner's CDL. Rather, both courts relied upon the FMCSR, not State substantive law. *See Burdine*, 2010 Ark. 455 at 7-8; (R. 36). Arkansas law was applicable only in this case for the purpose of establishing a procedure for Petitioner to seek *de novo* review in the circuit court to appeal the administrative decision of Respondent's hearing officer pursuant to Ark. Code Ann. § 27-16-913. *See Burdine*, 2010 Ark. 455 at 5. Any argument that the Arkansas Omnibus DWI Act, Ark. Code Ann. § 5-65-101, et seq, applies in this case is misplaced and is unsupported by statutory law or case law.

In the Trial Court, Respondent relied upon the Missouri Court of Appeals' decision in *Miller v. Director of Revenue*, 277 S.W.3d 290 (Mo.Ct.App. 2009) that an MDR administrative decision to suspend a person's driving privileges may constitute a "conviction" for purposes of imposing a disqualification of an individual's CDL. (Add. 12-13). In *Miller*, a CDL holder was arrested on November 18, 2006 for DWI while operating a non-commercial vehicle. The driver requested the MDR grant him an administrative hearing regarding his driving privileges. The MDR sent Miller two notices regarding his driving privileges. The first notice stated that his CDL would be disqualified effective December 18, 2006 and that he had 30 days to appeal the decision to the circuit court. The second notice sent to Miller stated that an administrative hearing concerning the suspension of his non-commercial driving privileges was scheduled for January 22, 2007. At the January 22, 2007 administrative hearing, the MDR's hearing officer issued findings of fact and conclusions of law which sustained the suspension of Miller's non-commercial driving privileges.

Miller appealed the disqualification of his CDL to circuit court. The circuit court entered its order affirming the disqualification of Miller's CDL wherein it relied upon the January 22, 2007 administrative finding by the MDR to establish the requisite "conviction" pursuant to RSMo § 302.700(8). *Miller*, 277 S.W.3d at 292.

On appeal, the Missouri Court of Appeals affirmed the trial court's disqualification of Miller's CDL based upon the administrative finding of the MDR to establish a "conviction" for purposes of disqualifying Miller's CDL. *Id.* at 293-294. In so holding, the *Miller* court stated as follows:

> Under § 302.755.1(1), "a person is disqualified from driving a commercial motor vehicle for a period of not less than one year if he or she is convicted of driving under the influence of alcohol or a controlled substance." [...] The term "conviction" refers to "an unvacated adjudication of guilt, ... or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or *an authorized administrative proceeding*." § 302.700(8)[.] (Emphasis in original).

Following entry of the Trial Court's final order in this appeal, the Missouri Supreme Court decided *Strup v. Director of Revenue*, 311 S.W.3d 793 (Mo. banc 2010), which presented a factual scenario substantially similar to this appeal. In *Strup*, a CDL holder was arrested on July 22, 2006 for DWI in Missouri; however, the criminal charges were dismissed. On August 23, 2006, the MDR notified Strup that his CDL would be disqualified for one year as a result of his arrest for DWI. Strup requested the MDR grant him an administrative hearing to challenge the suspension of his non-commercial or "base" driving privilege. MDR's hearing officer sustained the suspension of Strup's non-commercial driving privileges.

Strup filed two separate petitions for review in circuit court to challenge the suspension of his non-commercial driving privileges and the disqualification of his CDL, which were consolidated into one action. In the trial court, Strup argued that his due process rights were violated because the MDR's decision to disqualify his CDL was made without a hearing or the opportunity to present or cross-examine witnesses. Strup also argued that the

MDR's decision to disqualify his CDL did not comport with the requirements of RSMo § 302, et seq.

The trial court affirmed the suspension of Strup's non-commercial driving privileges. However, the trial court agreed that Strup's due process rights were violated and the MDR did not properly follow RSMo § 302, et seq, and therefore reversed the decision of the MDR disqualifying Strup's CDL.

On appeal, the Missouri Supreme Court reversed the trial court's decision concerning the disqualification of Strup's CDL. The Missouri Supreme Court reversed the trial court's finding that the MDR did not properly follow Missouri statutory law concerning whether a requisite "conviction" had been established to impose the disqualification of Strup's CDL. In the appeal, the MDR argued that the administrative decision imposing the suspension of Strup's non-commercial driving privileges constitutes a "conviction" for purposes of disqualification of Strup's CDL. The Missouri Supreme Court agreed with the argument of the MDR as follows:

> Under the CDLA[5], a person is disqualified from driving a commercial motor vehicle for a period of not less than one year if "*convicted*" of a first violation. Section 302.755.1, RSMo Supp. 2005 (emphasis added). The CDLA defines "conviction" as "an unvacated adjudication of guilt, including pleas of guilt and nolo contendere, or *a determination that a person has violated or failed to comply with the*

5. Commercial Driver's License Act.

> *law in* a court of original jurisdiction or *an authorized administrative proceeding* ...." Section 302.700.2(8), RSMo Supp. 2005 (emphasis added).
>
> One of the first violations that establishes a "conviction" and merits disqualification under the CDLA is "[d]riving a motor vehicle under the influence of alcohol ...." Section 302.755.1(1). "Driving under the influence of alcohol" is defined in the CDLA to include "[h]aving any state, county or municipal alcohol-related enforcement contact, as defined in subsection 3 of section 302.525 ...." Section 302.700.2(13)(e). "Alcohol-related enforcement contact" includes "any suspension or revocation under sections 302.500 to 302.540 ...." Section 302.525.3, RSMo Supp. 2002.
>
> The circuit court erred in reversing the disqualification of Strup's commercial driving privilege because the suspension of Strup's base driver's license constitutes a conviction of driving under the influence of alcohol for the purposes of the CDLA, which is a first violation that merits disqualification of a person's commercial driver's privilege for a period of not less than one year.

Strup, 311 S.W.3d at 797-798.

The factual circumstances regarding Petitioner's arrest are almost identical to those in the *Strup* case. Petitioner was arrested in Missouri for DWI and was

granted an administrative hearing concerning his non-commerical driving privileges. (R. 138-140). The MDR hearing officer determined to sustain the imposition of the suspension of Petitioner's non-commercial driving privileges. *Id.* Like Strup's criminal DWI charge, Petitioner's criminal charge of DWI was dismissed by the prosecuting attorney. (R. 119).

For undetermined reasons in this case, the MDR did not impose the disqualification of Petitioner's CDL. When Petitioner transferred his CDL to Arkansas in January of 2009, 49 C.F.R. § 384.206(a)(2) mandated Respondent to obtain Petitioner's driver record for the prior ten (10) years. Respondent determined that Petitioner had adverse information in Petitioner's driver record and notified Petitioner in writing that Respondent would impose the disqualification as a result of the Missouri DWI license suspension pursuant to 49 C.F.R. §§ 384.206(b)(2) and 384.231(b). (R. 109-112). Petitioner was granted an administrative hearing before Respondent's Office of Driver Services as well as *de novo* hearing before the Circuit Court of Benton County, Arkansas. (R. 12, 35-36).

Respondent's administrative hearing officer and the Trial Court determined that the MDR administrative proceeding finding that Petitioner's driving privilege should be suspended constitutes a "conviction" for purposes of imposing the one-year disqualification of Petitioner's CDL. The Arkansas Supreme Court affirmed the Trial Court in all respects. The Missouri Court of Appeals in *Miller* and the Missouri Supreme Court in *Strup* established that it is proper for a Missouri trial court to rely upon an administrative finding that a person has been "convicted" of DWI to impose a CDL

disqualification. Petitioner has failed to address in his Petition either the *Miller* or *Strup* decisions or to cite any legal authorities that stand for countervailing positions.

From a review of authorities cited herein and the factual circumstances regarding Petitioner's arrest for DWI, it is clear that the MDR should have imposed the disqualification of Petitioner's CDL but failed to do so. Upon Petitioner's transfer of his CDL to Arkansas, Respondent promptly and properly imposed the disqualification as required by 49 C.F.R. §§ 384.206(b)(2) and 384.231(b). Petitioner has failed to present an important question of federal law that has not been, but should be, settled by this Court. Accordingly, the Petition for Writ of Certiorai should be denied.

The unambiguous language of 49 C.F.R. § 383.5 clearly recognizes that an administrative determination of the MDR that Petitioner violated or failed to comply with the law constitutes a "conviction" of DWI for purposes of disqualifying a CDL.

In support of Petitioner's second point in support of his Petition, Petitioner argues as follows:

> The Missouri Department of Revenue, an administrative tribunal, made the finding that Petitioner had been *arrested* upon probable cause to believe that he was driving a motor vehicle while his alcohol concentration was at or above the limit required by 302.505, RSMo. At no time did a Missouri *court* find that Petitioner was "under the influence as prescribed by [Missouri's] State law."

> Arkansas in turn determined Missouri's action to be tantamount to a conviction for purpose of the FMCSR. As a practical matter, Arkansas interpreted the fact that Missouri *suspended* Petitioner's license as the conviction – not that Petitioner's arrest was the conviction – wholly contrary to the plain language of the relevant FMCSR.

See Petition at 12-13.

As an initial matter, Petitioner concedes that the MDR is an administrative tribunal capable of rendering a administrative decision that would constitute a "conviction" for CDL disqualification purposes. More specifically, as noted above, Petitioner states, "The Missouri Department of Revenue, ***an administrative tribunal***, made the finding [...]". (Emphasis added). *See* Petition at 12. However, Petitioner then appears to contradict himself in his next sentence as follows, "At no time did a Missouri *court* find that Petitioner was "under the influence as prescribed by [Missouri's] State law." *Id.*

Clearly, a decision by a *court* that a person has violated or failed to comply with the law is not the only means to determine that a person has been "convicted". More specifically, 49 C.F.R. § 383.5 defines "conviction" to include a finding by an administrative tribunal as follows:

> *Conviction* means an unvacated adjudication of guilt, or ***a determination that a person has violated or failed to comply with the law*** in a court of original jurisdiction or ***by an authorized administrative tribunal***,

> an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated. (Emphasis added).

The administrative decision of the MDR stated as follows:

> 2. The *sole issue to be decided is whether by a preponderance of the evidence, the person was driving a vehicle pursuant to the circumstances set out in Section 302.505, RSMo.*
>
> ...
>
> 4. Based upon the preponderance of the evidence presented at the administrative hearing, Petitioner is found to have been arrested/stopped *upon probable cause to believe Petitioner was driving a motor vehicle while the alcohol concentration in the blood was at or above the limit required by Section 302.505*, RSMo, or if under age twenty-one, was stopped while operating a motor vehicle with a blood alcohol content of .02% or more by weight, and the Notice of Suspension/Revocation was therefore properly issued to or served upon Petitioner pursuant to Section 302.515 or 302.520, RSMo.

> 5. Administrative suspension or revocation of Petitioner's privilege to drive in the State of Missouri is required by Sections 302.505 and 302.525 RSMo.
>
> NOW, THEREFORE, IT IS THE DECISION OF THE MISSOURI DEPARTMENT OF REVENUE, that the issuance of the Notice of Suspension/Revocation is SUSTAINED. Petitioner's privilege to drive in the State of Missouri is hereby suspended as authorized and required by Sections 302.505 and 302.525, RSMo.

(R. 140).

Clearly, the plain language of the MDR administrative decision demonstrates that the MDR was to determine whether, by a preponderance of the evidence, there was probable cause to believe Petitioner was driving a motor vehicle while his alcohol concentration in his blood was at or above the limit required by RSMo § 302.505. The level of blood alcohol concentration ("BAC") prohibited by RSMo § 302.505 is eight-hundreths of one percent or more by weight (0.08%). Petitioner provided a BAC sample following his arrest of 0.08%, which clearly demonstrates that he was at the limit prohibited by RSMo § 302.505. (R. 132). Accordingly, the MDR suspended Petitioner's non-commercial driving privileges based upon this administrative finding. However, the MDR failed to disqualify Petitioner's CDL, which, pursuant to the Missouri Supreme Court's decision in *Strup*, it clearly should have done.

Respondent relied upon the administrative finding of the MDR to implement the disqualification of Petitioner's CDL as mandated by 49 C.F.R. §§ 384.206(b)(2) and 384.231(b). The Trial Court in Arkansas agreed that Respondent correctly relied upon the MDR administrative finding, which was affirmed by the Arkansas Supreme Court. Petitioner has failed to present an important question of federal law that has not been, but should be, settled by this Court. Accordingly, the Petition for Writ of Certiorai should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

MARTHA HUNT
PAUL M. GEHRING*
OFFICE OF REVENUE LEGAL COUNSEL
P.O. Box 1272, Room 2380
Little Rock, Arkansas 72203
(501) 682-7030
paul.gehring@dfa.arkansas.gov

Counsel for Respondent

* *Counsel of Record*